IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 27TH FEBRUARY 2007 / 8TH PHALGUNA 1928

RSA.No. 23 of 2007()

AS.61/2003 of ADDL.DISTRICT COURT (ADHOC)-II, ERNAKULAM
OS.857/1999 of I ADDL.M.C.,ERNAKULAM

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: APPELLANT/APPELLANT/1ST DEFENDANT

PHILOMINA, AGED 61,
W/O.A.L.JOSEPH, ALUGAL HOUSE, CENTENARY ROAD,
KALOOR, KOCHI- 682017.

BY ADV. SRI.DILEEP VARGHESE

RESPONDENTS: RESPONDENTS/PLAINTIFFS AND DEFENDANT 2 TO 6

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1. ANTONY @ SAMSON, S/O GEORGE,
ALUGAL HOUSE, NOW RESIDING AT CHIRAKKAPARAMBIL
HOUSE, M.A.BANK ROAD, CHERANELLOOR P.O.

2. SIMON STANLEY @ SANAJ, S/O.GEORGE DO.

3. PHILOMINA @ OMANA GEORGE,
W/O LATE ALUNGAL GEORGE, DO.

4. THE VICAR, ST.FRANCIS XAVIERS CHURCH,
KALOOR, COCHIN- 682017.

5. FRANCIS S/O.MICHAEL, PUTHEZHATHU, KALOOR
DO. DO.

6. STEPHEN, S/O.ANTONY, PUTHANVEETIL,
KATHRIKADAVU, ELAMKULAM VILLAGE, KANAYANOOR TALUK.

7. A.L.MICHAEL @ ALUGAL MICHAEL,
THYPPARAMBIL HOUSE, AZAD ROAD, KALOOR,
KOCHI-682017.

8. LONAN @ JOHNSON, S/O.A.L.GEORGE,
ALUNGAL HOUSE, R.M.V.ROAD, ELAMAKKARA P.O.,
KOCHI- 682026.

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 27/02/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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R.S.A. NO. 23 OF 2007

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Dated this the 27th day of February, 2007

JUDGMENT

First defendant in O.S.857/99 on the file of Munsiff Court, Ernakulam is the appellant. Respondents 1 to 3 are the plaintiffs and other respondents other defendants in the suit. Suit was filed for declaration and partition. The building situate in the plaint schedule property originally belonged to V.V. Joseph who granted a lease as per koolicharthu dated 3.10.1956 to Lonan. Eliza is the wife of Lonan. They got three sons George Alungal, Alungal Joseph and Alungal Micheal. Respondents 1 to 3 and eighth respondent are the children of George Alungal. Seventh defendant is the son of Alungal Micheal. According to respondents 1 to 3, appellant is the widow of Alungal Joseph. It was contended Lonan had kudikidappu right and after his death kudikidappu right devolved on his legal heirs. Landlords right

was subsequently transferred by Joseph in favour of St.Francis Xavier Church. Under Ext.A1 sale deed executed by respondents 4 and 5, the right of the Church over the plaint schedule property was transferred to the appellant recognizing kudikidappu right. According to respondents 1 to 3, the kudikidappu right shall enure to the benefit of all legal heirs of deceased Lonan and being legal heirs of George Alungal, one of the sons of deceased Lonan, they are entitled to get their share in the plaint schedule property. They sought a decree for declaration that Ext.A1 document was intended for the benefit of all the legal heirs of deceased Lonan and plaint schedule property is available for partition and they are entitled to get the 1/3 shares along with the eighth respondent.

2. Appellant resisted the suit contending that she is not the widow of Alungal Joseph and plaint schedule property was not kudikidappu and though originally Lonan obtained it on rent Ext.A1 is a pucca sale deed in favour of appellant and plaintiffs or other defendants have no right over

the plaint schedule property. It was admitted that Alungal Avira Lonan was the original tenant of the building in the plaint schedule property from October 1956 on the basis of Koolicharthu of 1956 and after the death of Lonan his wife Eliza and children continued to reside in the building as tenants. It was contended that the three cents of the plaint schedule property along with the building originally belonged to V.V.Joseph who assigned his right in favour of St.Francis Xavier Church and till 1995 legal heirs of deceased Lonan were residing therein. According to appellant, after the death of Eliza, Joseph, husband of appellant, was residing in the building with his family as tenants and while so appellant and her husband approached the Vicar of the Church and the trustees to assign their right as kudikidappukars since they and their predecessors were residing in the building for the last more than 40 years and hence respondents 4 and 5 assigned the plaint schedule property by executing Ext.A1 sale deed and it was executed in her favour as desired by her husband and since then the building and the

property are in the exclusive possession of appellant and it is not available for partition and plaintiffs are not entitled to the decree sought for. It was also contended that plaintiffs are not entitled to get any declaration as sought for and the suit is barred by limitation and is to be dismissed.

3. Learned Munsiff framed necessary issues. On the evidence of Pws. 1 and 2 and DW1 and Exts.A1 to A6 and B1 series and B2 series, learned Munsiff found that the building in the plaint schedule property was obtained on lease by Lonan as a tenant and it was a kudikidappu and the right transferred under Ext.A1 is recognizing the kudikidappu right and it shall enure to the benefit of all the legal heirs of Lonan and hence it is available for partition. The suit was decreed declaring that Ext.A1 document is intended for the benefit of all legal heirs of late Lonan and plaint schedule property is available for partition and it is to be divided into three equal shares and respondents 1 to 3 along with eighth respondent are entitled to get one such share. Appellant

challenged the decree and judgment before District Court, Ernakulam in A.S.61/03. Learned Additional District Judge on reappreciation of evidence confirmed the decree and judgment and dismissed the appeal. It is challenged in this Second Appeal.

4. Learned counsel made available copy of Ext.A1 sale deed as well as copies of depositions of Pws. 1 and 2 and DW1.

5. Learned counsel appearing for appellant was heard.

6. The arguments of learned counsel appearing for appellant was that though Ext.A1 shows that the property was transferred to appellant as kudikidappu property, it was so stated only to avoid payment of consideration recognizing the financial condition of the appellant by the Church officials and it was proved by the evidence of DW2 Stephen. It was argued that courts below did not appreciate the evidence in the proper perspective and should have found that deceased Lonan had no kudikidappu right and what was assigned under Ext.A1 is the jenm right over the plaint schedule property and therefore courts below should have

found that except appellant nobody else has any right over the plaint schedule property. Learned counsel further argued that evidence of PW1 shows that deceased Lonan had four daughters and the suit is bad for their non-joinder. It was argued that there is no evidence to prove that Alungal Joseph, husband of the appellant is no more and therefore without impleading him courts below should not have granted a decree for partition. Learned counsel further argued that at any rate courts below should have found that the claim of plaintiffs is barred by limitation.

7. On hearing learned counsel appearing for appellant and on going through the judgment of the courts below as well as Ext.A1 and depositions of witnesses examined by the parties, I cannot accept the arguments of learned counsel.

8. Ext.A1 shows that the building situate in plaint schedule property was originally granted on lease and the right transferred in favour of appellant under Ext.A1 was recognizing the kudikidappu right available to the tenant who obtained the building on rent. It is not disputed

that as per koolicharthu of October 1956, the building was outstanding in the posssession of Lonan as a tenant. Even in the written statement appellant admitted that after the death of Lonan, his widow Eliza and children continued residing therein till 1995. Ext.A1 sale deed was only executed in 1995. Suit was filed in 1999. The very case of the appellant pleaded in the written statement is that she started residing therein as the wife of Alungal Joseph, one of the sons of Lonappan. Evidence of DW1 also establish that she has no case that there was an independent lease in her favour. It falsifies the recital in Ext.A1 to that effect. Her case was only that she continued to reside in the building as the wife of Alungal Joseph, one of the legal heirs of original tenant Lonan. Courts below on appreciating the evidence rightly found that what was transferred under Ext.A1 is recognizing the right of deceased Lonan the kudikidappukaran who obtained the building as Koolicharthu of 1956. Evidence establish that the building being a kudikidappu and the tenant kudikidappukaran landlords right was transferred

under Ext.A1 in favour of kudikidappukars. Though document was written in the name of the appellant, it is absolutely clear that appellant has no independent right except the right of widow of Alungal Joseph, who was one of the legal heirs of deceased Lonan. The findings of courts below that the right transferred under Ext.A1 was recognizing the kudikidappu right of Lonan and is available for partition is perfectly correct.

9. Learned counsel appearing for appellant also argued that suit is bad for non-joinder of Alungal Joseph, husband of appellant. The argument was that he is alive. On going through the copy of the written statement made available I do not find a specific plea that Alungal Joseph was alive at the time of filing the suit. The only statement seen in the written statement is the denial of the case that she is the widow of Alungal Joseph. There is no plea that Alungal Joseph was alive at that time or that suit is bad for non-joinder of her husband Joseph. Even when appellant was examined as PW1, she has not deposed that her husband Alungal Joseph was alive. Even when third

respondent/third plaintiff was examined as PW2, such a case was not put to PW2. It was also argued by learned counsel that the evidence of PW1 establish that Lonan has four daughters and without impleading them a decree for partition should not have been granted. These facts were not agitated before the courts below. There was no pleading in the written statement that on the death of Lonan his rights also devolved on the daughters and the suit is barred for non-joinder. In the absence of pleading that suit is bad for non-joinder of daughters of Lonan or that Alungal Joseph was alive and therefore suit is bad for non-joinder, appellant cannot be permitted to take up new contentions in the second appeal.

10. Though it was contended that suit is barred by time, even in the plaint it was admitted that the building was occupied by Eliza and her children till 1955. Ext.A1 was executed only on 5-5-1995. Suit was filed in 1999. There was no case of any ouster. In the absence of a plea of ouster, plea of adverse possession against a co-owner will not lie as possession of the co-owner has to be treated

for the others also. There was no evidence to substantiate the plea of bar of limitation.

11. No substantial question of law is involved in the appeal. The appeal is bereft of merits. Appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006